Supreme Court, U.S.
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No. 95-139

IN THE
Supreme Court of the United States
October Term, 1995

COOPER TIRE AND RUBBER COMPANY
Petitioner
v.
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, RICHARD C. PILLSBURY, M.D. AND ROBERT MAZA
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION
FOR RICHARD C. PILLSBURY, M.D. AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY

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QUESTIONS PRESENTED

I.

SHOULD THE FEDERAL COMMON LAW OF UNJUST ENRICHMENT UNDER ERISA BE ADDRESSED IN THIS CASE WHEN PETITIONER FAILED TO RAISE THIS QUESTION BELOW AND WHEN NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS RULED ON THAT ISSUE?

II.

SHOULD THIS COURT REVISIT *FIRESTONE TIRE AND RUBBER CO. V. BRUCH*'S ABUSE-OF-DISCRETION STANDARD OF REVIEW FOR ERISA PLAN INTERPRETATIONS WHEN THAT RULE OF LAW IS BEING CONSISTENTLY AND FAITHFULLY FOLLOWED BY THE COURTS OF APPEALS?

III.

DID THE COURT OF APPEALS ABUSE ITS DISCRETION BY DECIDING THIS ERISA CASE ON *BRUCH* GROUNDS ON A SUFFICIENT RECORD WHEN THE PARTIES OVERLOOK THAT ANTECEDENT LEGAL ISSUE?

PARTIES TO THE PROCEEDINGS

All the parties to the proceedings in the United States Court of Appeals for the Eighth Circuit are included in the caption. The St. Paul Companies, as the parent company of respondent St. Paul Fire and Marine Insurance Company, has an indirect interest in this appeal. The following companies, as affiliates of the St. Paul Fire and Marine Insurance Company, also have an indirect interest in this appeal: St. Paul Mercury Insurance Company; St. Paul Guardian Insurance Company; The St. Paul Insurance Company; The St. Paul Insurance Company of Illinois; St. Paul Property and Casualty Insurance Company; St. Paul Fire and Casualty Insurance Company; St. Paul Indemnity Insurance Company; and St. Paul Insurance Company of North Dakota.

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BRIEF IN OPPOSITION FOR RICHARD C. PILLSBURY, M.D. AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Respondents Dr. Richard C. Pillsbury and St. Paul Fire and Marine Insurance Company respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit reported at 48 F.3d 365 (1995) and reprinted at *Appendix ("App.") 1-20.*

STATEMENT OF THE CASE

This ERISA case arises from Cooper Tire and Rubber Company's interpretation of its subrogation rights under its employee benefit plan. Robert Maza has worked in the millroom of Cooper Tire's El Dorado, Arkansas plant for almost thirty years. Cooper Tire has a self-funded employee benefit plan subject to ERISA, the Employee Retirement Income Security Act, 29 U.S.C.A. §§1001, *et seq.*, as amended. Mr. Maza's wife, Sandra, fell ill, and the Mazas sought benefits under the Plan to pay her medical bills. Mrs. Maza eventually died. The Plan paid out $298,118.07 for her medical expenses.

Cooper Tire's Plan specifically reserved a right of subrogation against third parties who might eventually become liable for the medical bills paid by the Plan on behalf of a beneficiary such as Mrs. Maza. The Plan's subrogation rights, however, extended only to claims for recovery of medical expenses paid by the Plan. It provided:

> In the event an Employee or dependent of an Employee, including the surviving spouse or a surviving dependent of a deceased Employee, is legally entitled to recover, including recovery under uninsured motorist coverage, all or a portion of the cost of a service or prescription drug covered by this Plan from a third party, **the Company will upon making payment under this Plan succeed to any rights of recovery the Employee or dependent may have or acquire (with respect to such service or prescription drug) against any person or organization** except insurers of individual

> hospital, surgical, or medical policies issued to the Employee or dependent.
>
> Employees (including dependents, surviving spouses or surviving dependents of deceased Employees) by acceptance of such benefit payments agree to furnish such information and assistance, and execute such assignment or other instruments as the Company may reasonably request to facilitate enforcement of the successor rights of the Company. Employees and their dependents shall take no action prejudicing such rights of the Company.

Appendix ("App.") 86A (emphasis added).

Before paying any of Mrs. Maza's medical bills, Cooper Tire asked for and received receipt and subrogation agreements from Mr. Maza. Those separate agreements reaffirmed Cooper Tire's subrogation rights. Those side agreements, however, also expanded the Plan's subrogation rights beyond claims for medical expenses paid by the Plan to all related claims Mr. or Mrs. Maza might have against third parties. Further, the agreements forbade the Mazas from settling any such claims without Cooper Tire's prior written consent. *App. 100-101.*

The relevant text of the receipt and subrogation agreements provided:

> **In consideration of and to the extent said payment the undersigned hereby subrogates said Cooper Tire & Rubber Company, to all of the rights, claims and interest which the undersigned may have against any person or corporation liable for the**

> **loss mentioned above,** and authorizes the said Cooper Tire & Rubber Company to sue, compromise or settle the undersigned's name or otherwise all such claims and to execute and sign releases and acquittances and endorse checks or drafts given in settlement of such claims in the name of the undersigned, with the same force and effect as if the undersigned executed or endorsed them.
>
> **Warranted no settlement has been made by the undersigned with any person or corporation against whom a claim may lie, and no release has been given to anyone responsible for the loss, and that no such settlement will be made nor release given by the undersigned without the written consent of the said Cooper Tire & Rubber Company** and the undersigned covenants and agrees to cooperate fully (and to exert his best efforts to cause any effected spouse or dependent to attend court and testify) if Cooper Tire & Rubber Company deems such to be necessary but it is understood the undersigned is to be saved harmless from costs in such proceedings.
>
> This RECEIPT AND SUBROGATION AGREEMENT is subject to the provisions of Article 12, Section E of Cooper Salaried Employees Medical Benefits, effective 1/1/86.

App. 100 (emphasis added).

After Sandra Maza died, Mr. Maza sued her doctor, Dr. Richard C. Pillsbury, for malpractice. St. Paul Fire and Marine Insurance Company provided a defense

to Dr. Pillsbury, its insured. Without objection, Cooper Tire intervened in the suit asserting its subrogation rights.

After extensive negotiations between all the parties, Mr. Maza and Dr. Pillsbury reached a separate settlement. That settlement specifically preserved Cooper Tire's subrogation claim. Despite repeated offers and counter-offers, Cooper Tire and Dr. Pillsbury never reached an agreement on settling Cooper Tire's subrogation claim. Cooper Tire never consented in writing to the Maza-Pillsbury separate settlement. Despite being informed orally that the separate settlement had been agreed upon, Cooper Tire never objected to it. The Maza-Pillsbury settlement was eventually approved by the Arkansas state courts, and Maza was dismissed from the state court suit. Cooper Tire's subrogation claim against Dr. Pillsbury for Mrs. Maza's medical bills were preserved in the dismissal. After receiving notice of the dismissal, Cooper Tire still remained silent.

Several months and a new lawyer later, Cooper Tire dismissed its state court action against Dr. Pillsbury and filed this suit in federal court. Cooper Tire alleged that Mr. Maza had breached the subrogation agreement. *Supplemental Appendix "Supp. App." A6.* Cooper Tire also claimed that, through the separate settlement, Dr. Pillsbury and St. Paul had intentionally interfered with the Plan's subrogation contract with Maza. *Supp. App. A6.* Cooper Tire did not assert any claim under the federal common law nor plead unjust enrichment as a theory of damages. Dr. Pillsbury, Mr. Maza, and St. Paul defended on several grounds, principally that Cooper Tire's course of conduct during the state court suit estopped it to assert

its claimed prior-consent right after acquiescing in the Maza-Pillsbury agreement.

After a bench trial, the District Court held for Cooper Tire. The Court—characterizing Cooper Tire's suit as one for breach of contractual relations—rejected respondents' estoppel defense. *App. 32-33.* The District Court did not consider or rule upon the federal common law of unjust enrichment under ERISA.

Dr. Pillsbury, Mr. Maza, and St. Paul appealed to the United States Court of Appeals for the Eighth Circuit. Respondents claimed that the District Court erred in not accepting their estoppel defense. Cooper Tire cross appealed on one issue: the denial of attorney's fees. Cooper Tire did not brief or argue the federal common law of unjust enrichment under ERISA.

After oral argument, a unanimous panel of the Eighth Circuit reversed the District Court's decision. The Court of Appeals did not reach respondents' estoppel contentions. Instead, on its own initiative, the Eighth Circuit held that Maza's separate settlement did not violate the Plan or impair Cooper Tire's subrogation rights under the Plan. The Eighth Circuit concluded further that Cooper Tire's separate subrogation and receipt agreements were not reasonable interpretations of the Plan. Those agreements, the Court held, unreasonably expanded Cooper Tire's subrogation rights after the Mazas' right to benefits had already vested under the Plan. In particular, the Court of Appeals held that the right of prior consent to the settlement of all of Mr. Maza's claims, and the expansion of subrogation to all claims (beyond claims just

for medical expenses paid by the Plan) were unreasonable, after-the-fact interpretations of the Plan by Cooper Tire. Having held that Maza did not violate the Plan's subrogation rights through the separate settlement, the Court also concluded that Dr. Pillsbury and St. Paul had not intentionally interfered with those rights. *App. 9-18.*

Cooper Tire's petition for rehearing by the Eighth Circuit panel and rehearing en banc was denied. This petition for certiorari followed in due course. *App. 21.*

REASONS FOR DENYING THE WRIT

No good reason exists to grant certiorari. Petitioner's first argument for review is misplaced. An inter-circuit conflict may or may not exist over the federal common law of unjust enrichment under ERISA. But petitioner did not raise or preserve this issue below. And neither the District Court nor the Court of Appeals considered or decided that issue in this case. Petitioner's second argument for review is wrong on the law. In general, and in this case, the Courts of Appeals are faithfully and consistently applying the abuse-of-discretion standard of review established by this Court's decision in *Firestone Tire and Rubber Co. v. Bruch.* Therefore, no conflict exists justifying this Court's attention. Petitioner's final argument stumbles on the facts and the law. Acting on a sufficient evidentiary record and within its considered discretion, the Eighth Circuit decided this case on legal grounds antecedent to the parties' contentions. The Eighth Circuit's decision followed the law laid down by this Court and harmonizes with decisions of the other Courts of Appeals. None of the traditional and important concerns motivating review being present, the Court should deny the petition for certiorari.

BEST AVAIL

I.

THE WRIT SHOULD BE DENIED BECAUSE WHETHER THE FEDERAL COMMON LAW OF ERISA INCLUDES AN EQUITABLE CLAIM FOR UNJUST ENRICHMENT WAS NEITHER PLEADED NOR ARGUED BY PETITIONER BELOW, NOR DECIDED BY EITHER THE DISTRICT COURT OR THE COURT OF APPEALS

Cooper Tire petitions for review flying flags of inter-circuit conflict in the federal common law. Petitioner argues that the circuits divide over whether ERISA supports a claim of unjust enrichment. Whatever may be the state of the law on that issue, however, it does not justify review in this case. Since the unjust-enrichment question was not raised by petitioner or decided by either court below, this record simply will not support certiorari on that basis.

A. The District Court's Decision Was Not Based on the Federal Common Law of Unjust Enrichment under ERISA

Petitioner's claims against Mr. Maza, Dr. Pillsbury, and St. Paul have never invoked the federal common law of unjust enrichment. Cooper Tire's complaint sought damages against Maza for his alleged breach of contract. *Supp. App. A6.* Petitioner also sought money damages from Dr. Pillsbury and St. Paul for their alleged interference with the Maza-Cooper Tire subrogation contract. *Supp. App. A6.* Petitioner did not plead or argue the federal common law of unjust enrichment under ERISA in the District Court.

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The District Court recognized a breach-of-contract case when it saw one. It correctly summarized petitioner's suit this way: "The issues for the Court to determine are whether Maza breached the terms of the Subrogation Agreement by settling with Pillsbury without Cooper Tire's written consent and whether St. Paul and Pillsbury interfered with the contractual relationship between Maza and Cooper Tire." *App. 32-33.*

Petitioner mischaracterizes the District Court's decision to the contrary. The trial Court, Cooper Tire says, "relied upon an ERISA-based federal common law theory of unjust enrichment recognized by the United States Court of Appeals for the Fourth Circuit in *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 993 (4th Cir. 1990), *cert. denied*, 498 U.S. 982 (1990)." *Petitioner ("Pet.") 5.* That is simply not so. Petitioner also claims that the District Court "implicitly grounded its finding in favor of Cooper on the federal common law of unjust enrichment." *Pet. 16.* That interpretation springs from petitioner's imagination, not the record.

The District Court never considered the federal common law of unjust enrichment—rightly so, since no one argued that issue. The trial Court, it is true, cited *Provident Life* and noted its obligation to make federal common law where needed in this ERISA case. *App. 32.* The Court only considered the federal common law, however, while resolving Dr. Pillsbury's and St. Paul's estoppel defense to Cooper Tire's suit. *App. 34-35.* The District Court ultimately rejected that estoppel defense, both as a matter of state law and federal common law. Contrary to the petitioner's representation, however, the District Court never relied upon the federal common law of unjust enrichment in considering petitioner's claims.

B. THE EIGHTH CIRCUIT DID NOT REACH THE UNJUST-ENRICHMENT QUESTION.

The Eighth Circuit likewise never considered or decided whether the federal common law of ERISA supports an unjust-enrichment claim. Petitioner mischaracterizes the Court of Appeals' decision in hopes of creating a holding where there is none. The Eighth Circuit did not "reject[ ] the federal common law basis of the District Court's decision[,]" *Pet. 8*, or "overlook[ ] the fact that the District Court explicitly based its decision on the Federal Common Law. . . ." *Pet. 16.*

How, then, did the Eighth Circuit handle this issue? In its prefatory remarks, the Court of Appeals situated Cooper Tire's claim for relief in the context of ERISA's civil enforcement provisions. *App. 10-11.* But contrary to petitioner's argument, the Eighth Circuit did not decide whether the federal common law of unjust enrichment under ERISA supported Cooper Tire's damage award. The Court of Appeals never reached that issue, and said as much: "Under 1132(a)(3)(B), Cooper Tire is entitled only to 'appropriate equitable relief.' Based on our resolution of this case, we do not reach the issue of whether the relief awarded by the district court was 'equitable relief.' " *App. 11 note 7.*

Petitioner thus seeks review on an issue explicitly not decided by the Court of Appeals or the District Court. Whatever the law may be in the several circuits in the wake of *Provident Life*, the Eighth Circuit declined to reach that question in this case. So there is no holding to

review. Moreover, granting review would be futile. Whatever decision this Court might make would have no effect on the Court of Appeals' judgment, a judgment resting solely on *Firestone Tire and Rubber Co. v. Bruch.* This Court should therefore deny certiorari. The federal common law of unjust enrichment under ERISA should be left for decision in a later case where there is an actual decision below to review.

II.

THE WRIT SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT CORRECTLY APPLIED *FIRESTONE TIRE AND RUBBER CO. V. BRUCH,* GIVING PROPER DEFERENCE TO COOPER TIRE'S INTERPRETATION OF ITS ERISA PLAN

Petitioner argues that this Court's decision in *Bruch* is deficient. Cooper Tire says this Court gave insufficient guidance on the abuse-of-discretion standard, spawning conflicting applications of the standard in similar cases. Petitioner is mistaken. There is no real need for this Court to revisit *Bruch.*

A. *Bruch* Offers Adequate Guidance on the Abuse-of-Discretion Standard of Review

This Court has clearly divided ERISA plans into two groups for purposes of judicial review: plans that vest interpretive discretion in the administrator and plans that do not. *Bruch,* 489 U.S. at 115. Plan interpretations made by an administrator without interpretive discretion are

reviewed *de novo*. This review is searching, lacking all deference to the administrator's views. It entails an independent judicial judgment, in light of all relevant circumstances, of the plan writer's intentions in search of the correct interpretation of the plan. *Bruch*, 489 U.S. at 112.

On the other hand, plan interpretations made by administrators vested with discretion are reviewed only for an abuse of discretion. That review draws on traditional principles from the common law of trusts. *Bruch*, 489 U.S. at 111 (adopting §§187 and 559 of the *Restatement (Second) of Trusts)*. The reviewing court's compass is the "reasonableness" of the plan administrator's decision. *Ibid.* No independent judgment by the court comes into play. Instead, the administrator's decision is measured against the plan itself and other factors, looking only for arbitrariness or capriciousness. *Ibid.*

These principles are sound. They are clear. The Courts of Appeals have followed them faithfully since *Bruch* came down. No need exists for this Court to expend its limited resources in revisiting this settled legal landscape.

B. No Real Conflict Exists among the Circuits' Application of *Bruch*'s Abuse-of-Discretion Standard

The circuits speak with one voice when reviewing the decision of an ERISA plan administrator vested with discretion. Reasonableness of the interpretation is all. Petitioner's own allegedly conflicting cases establish this consistent effort. *E.g.*, *Abnathya v. Hoffman-La Roche*,

Inc., 2 F.3d 40, 44-45 (3rd Cir. 1993) (interpretation abusive if "without reason"); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187-88 (4th Cir. 1989) (interpretation "will not be disturbed if reasonable"); *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 984 (6th Cir. 1991) (interpretation upheld if "rational in light of the plan's provisions"); *Cutting v. Jerome Foods, Inc.*, 993 F.3d 1293, 1295-96 (7th Cir. 1993) (interpretation rejected only if unreasonable); *Finley v. Special Agents Mutual Benefits Ass'n.*, 957 F.2d 617, 621 (8th Cir. 1992) (ultimate question is reasonableness); *Block v. Pitney Bowes Inc.*, 952 F.2d 1450, 1454 (D.C. Cir. 1992) (reasonableness is "essential inquiry"). This legal harmony results from this Court's teachings in *Bruch*. And the circuits do not need further instruction.

Different circuits, it is certainly true, formulate this standard of review in slightly different ways. But these superficial verbalisms cannot disturb the deeper substantive agreement in the law. As then-circuit Judge Ginsberg put it, "[t]he reasonableness of the plan [administrator's] decision is our polestar. . . . " *Bowes*, 952 F.2d at 1454. Whether styled as arbitrary-or-capricious review, abuse-of-discretion review, an unrefined reasonableness inquiry, or a reasonableness inquiry based on a list of factors, the judicial effort and goal remain the same: did the plan administrator reasonably construe and apply the plan? *Bowes*, 952 F.2d at 1454.

Moreover, the several circuits' slight variations on the theme of reasonableness nourish the law. In certain circumstances, for example, the Eleventh Circuit weighs a plan administrator's conflicts of interest in reviewing the

reasonableness of a decision. *Florence Nightingale Nursing Service, Inc. v. Blue Cross/Blue Shield of Alabama*, 41 F.3d 1476, 1480-81 (11th Cir. 1995) (citing *Bruch*). That consideration, well grounded in the common law of trusts, is a useful signpost on the road to reasonableness. If eventually adopted by other circuits, the resulting cross-pollenization will keep reasonableness review under *Bruch* vigorous. Contrary to petitioner's claim, the slight variations among the circuits evidences healthy law, not conflict.

A comparison of the Eighth Circuit's decision below with the Seventh Circuit's decision in *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993), makes the point. Petitioner cites *Cutting* as evidence of dissonant interpretations of the abuse-of-discretion standard. *Pet. 19-20.* Not so. *Cutting* would have been decided the same way by the Eighth Circuit, just as Cooper Tire's interpretation of its Plan in this case would have been held unreasonable by the Seventh Circuit. Why? Because petitioner omits the key difference between *Cutting* and this case: the language of the plan.

The plan's subrogation term drives the Court's judicial review for reasonableness. In *Cutting*, the plan itself extended its subrogation rights for payment of medical benefits to **all** potential claims by a beneficiary, including non-medical claims. 993 F.2d at 1295, 1298-99. Since these extended subrogation rights were rooted in the plan, conditioning payment of medical benefits on the execution of separate receipt agreements which tracked the plan exactly was a reasonable interpretation of the

plan. It was thus not arbitrary or capricious for the plan to reject the beneficiaries' claim to be made whole before the plan was reimbursed. *Cutting*, 993 F.2d at 1298-99.

Those are not our facts. Cooper Tire tried to extend and expand the Plan's subrogation rights in the side agreements. The Eighth Circuit properly rejected that attempt as unreasonable, especially since the expansion was attempted after the Mazas' rights to medical benefits had vested. *App. 16-17.* Cooper Tire's attempt to change the rules in the middle of the game is the essence of arbitrariness.

The plan in *Cutting* makes another important point. The Court of Appeals decision in this case neither handicaps petitioner nor revolutionizes the law of ERISA subrogation terms. The *Cutting* plan is Cooper Tire's road map to the subrogation rights it seeks. All petitioner must do is amend the Plan itself, rather than trying to smuggle changes into the Plan through post-hoc side agreements. The decision below therefore affirms an important and well settled principle: an ERISA plan administrator's discretion is substantial but not unbounded. *App. 17; Bruch*, 489 U.S. at 111, 115.

C. The Eighth Circuit Properly Deferred to the Plan Administrator's Interpretation, While Refusing the Plan's Attempted Expansion of Its Subrogation Rights Through Post-Hoc Side Agreements

The Court of Appeals followed *Bruch.* It deferred broadly though not completely to Cooper Tire's interpretation of its Plan. The Eighth Circuit did not confront this case anew, giving no weight to the administrator's decision. The Court of Appeals specifically held that Cooper Tire's interpretation was not inconsistent with the Plan's goals. The Court also held that the interpretation did not render any Plan language inconsistent. *App. 15.* The conclusions show the Eighth Circuit's starting point: Cooper Tire's interpretation was presumptively reasonable.

There is, however, more to the yardstick of reasonableness. The Eighth Circuit correctly held that the Plan's interpretation conflicted with ERISA. The summary Plan description failed to notify participants that Cooper Tire intended to stretch its subrogation rights to include all claims. *App. 15.* The Court's inquiry here defers to the Plan, while requiring legal correctness. Not following the law is arbitrary and capricious. Therefore, this part of the Eighth Circuit's analysis epitomizes reasonableness review. It does not suggest *de novo* review. Moreover, the Eighth Circuit's inquiry into legal correctness accords with other circuits which petitioner claims properly defer to the administrator. *Pet. 22-23; e.g., Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1456-57 (10th Cir. 1991).

The Eighth Circuit's comparison of Cooper Tire's interpretation with the plain language of the Plan also follows *Bruch* faithfully. *App. 15, 16-17.* The gap between petitioner's Plan and its interpretation thereof in the separate agreements was, to the Eighth Circuit, the most important indicator of reasonableness.

> Cooper Tire's subrogation rights are expressly limited to Maza's right to recovery of medical expenses. Per the language of the Plan, Cooper Tire 'succeeds' only to rights of recovery an employee may have 'with respect to' services or drugs covered by the Plan. Thus, Cooper Tire's subrogation rights do not extend beyond its claim for medical expenses. Given this limitation, Cooper Tire may not demand written consent prior to settlement of non-medical expense claims and characterize it as a means to 'facilitate enforcement' of its subrogation rights.

App. 16.

The Court's comparison of Plan terms with Cooper Tire's interpretation is deferential but eminently sensible. It does not start from scratch like *de novo* review. Rather, it starts with the presumptively correct interpretation of the administrator and then evaluates that interpretation in light of the governing Plan document. Courts across the circuits undertake this inquiry, including decisions petitioner advances as properly deferential. *E.g.*, *Haubold v. Intermedics, Inc.*, 11 F.3d 1333, 1337 (5th Cir. 1994). The Eighth Circuit, therefore, correctly leavened its deference with important questions about reasonableness. *Bruch* requires no less.

III.

THE WRIT SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT PROPERLY DECIDED THIS CASE ON A LEGAL GROUND ANTECEDENT TO THE PARTIES' ARGUMENTS

Finally, petitioner charges the Court of Appeals with overreaching. Cooper Tire claims that the Eighth Circuit acted beyond its discretion, without a sufficient record and in conflict with this Court's decisions. Petitioner's argument is wrong on each count.

A. The Eighth Circuit Acted Within Its Discretion in Deciding this Case on *Bruch* Grounds

This Court has held many times that, in the exercise of considered discretion, an appellate court may decide a case upon an antecedent legal ground not articulated by the parties. *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99-100 (1991); *U. S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 113 S.Ct. 2173, 2177-79 (1993); *see also, Lebron v. National R.R. Passenger Corp.*, 115 S.Ct. 961, 966 (1995) (discussing rationale of *Independent Insurance Agents).* Writing for the Court in *Independent Insurance Agents,* Justice Souter summarized this rule of law. "[A] court may consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." 113 S.Ct. at 2178 (quoting *Arcadia).*

This principle undergirds the Eighth Circuit's decision applying *Firestone Tire and Rubber Co. v. Bruch* in this case. This dispute turned, from day one, on the enforceability of Cooper Tire's right to consent in writing before a settlement by Maza of his separate claims beyond those to recover the medical expenses paid by the Plan. In the District Court and the Court of Appeals, Dr. Pillsbury and St. Paul attacked Cooper Tire's prior-consent right on estoppel grounds. They still believe Cooper Tire is estopped to assert that right based on its acts and omissions acquiescing in the separate settlement, and by the separate settlement's preservation of Cooper Tire's subrogation rights. But, "antecedent to . . . " the estoppel question, as the Eighth Circuit recognized, was a more basic question of ERISA law: were the receipt and subrogation agreements—which created the prior-consent right and extended Cooper Tire's subrogation rights to all of Mr. Maza's claims—reasonable interpretations of Cooper Tire's Plan? *Arcadia*, 498 U.S. at 77. The Court of Appeals' answer—no—was "ultimately dispositive of the present dispute . . . " over Cooper Tire's subrogation rights. *Ibid.*

A brief review of *Arcadia*, *Kamen*, and *Independent Insurance Agents* demonstrates the propriety of the Eighth Circuit's decision in this case. In *Arcadia*, the parties' dispute centered on §318 of the Federal Power Act governing jurisdictional conflicts between the Federal Energy Regulatory Commission (FERC) and the Securities and Exchange Commission (SEC). The parties debated whether an actual conflict between FERC and SEC regulations was required to trigger §318, and whether such a conflict existed in that case. This Court unani-

mously decided the case on an issue not raised, briefed, or argued: whether the SEC and FERC orders at issue actually "impose[d] requirements with respect to a subject matter that is within the scope of §318." *Arcadia*, 498 U.S. at 77. Holding that the orders were not within §318's coverage to begin with, this Court reversed on this antecedent and dispositive legal ground.

The same principle disposed of *Kamen* and *Independent Insurance Agents*. In *Kamen*, a shareholder derivative suit, the plaintiff failed to argue that existing state law (rather than federal common law) should govern the case until his reply brief on appeal. The Court of Appeals refused to consider the issue, holding it waived. This Court disagreed and reversed on that very ground. "When any issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of the governing law." *Kamen*, 500 U.S. at 99; *see also, Independent Insurance Agents*, 113 S.Ct. at 2177-79 (considering antecedent and dispositive legal issue of the repeal or viability of §92 of the National Banking Act); *Lebron*, 115 S.Ct. at 966 (explaining *Independent Insurance Agents'* rationale.)

In this case, the Court of Appeals retained the "independent power to identify and apply the proper construction of [ERISA] law." *Kamen*, 500 U.S. at 99. It did so—by evaluating the reasonableness of Cooper Tire's interpretation of its Plan embodied in the receipt and subrogation agreements. It did so properly under *Arcadia*, *Kamen*, and *Independent Insurance Agents*. Therefore,

"[t]here is no need to linger long over [Cooper Tire's] argument" that the Court of Appeals acted inappropriately. *Independent Insurance Agents*, 113 S.Ct. at 2178.

B. The Eighth Circuit Acted on a Sufficient Record

The Eighth Circuit's opinion correctly applies the governing law on a sufficient record. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Finley v. Special Agents Mutual Benefit Ass'n.*, 957 F.2d 617, 621 (8th Cir. 1992). Three key facts—two of which were undisputed—conclusively demonstrate that Cooper Tire abused its discretion in interpreting the Plan in the receipt and subrogation agreements.

First, the summary Plan description did not inform Mr. Maza that, upon payment of medical expenses, Cooper Tire would be subrogated to **all** his claims against third parties. That fact is undisputed. It dooms Cooper Tire's contrary interpretation in the post-claim separate agreements. Second, Cooper Tire interpreted its subrogation rights inconsistently. The receipt and subrogation agreements extend those rights to all claims. *App. 100-01.* Cooper Tire, however, sent a letter to Mr. Maza in 1980 which purported to explain the Plan's "often misunderstood" subrogation term. *Supp. App. B1.* The letter did not mention extending the Plan's subrogation rights to all potential claims, or the Plan's intention to reserve a prior-consent right over any separate settlement. *Supp. App. B4.* The inconsistency between the letter and the later side agreements was the only fact found by the Court of Appeals during its analysis. That finding, moreover, is clearly

correct based on the documentary evidence. Third, the receipt and subrogation agreements are contrary to the plain language of the Plan. Cooper Tire's Plan does not create either a prior-consent right or subrogation rights in all of Maza's potential claims against third parties. Cooper Tire's attempt to change the Plan's terms, after the Mazas claimed benefits, was unreasonable, as the Court of Appeals held.

A complete array of Plan documents lies behind the Eighth Circuit's conclusion that Cooper Tire abused its discretion. The Cooper Tire Plan, the summary Plan description, exemplars of the receipt and subrogation agreements, a letter from Cooper Tire about subrogation and the Plan, and the undisputed sequence of events leading to this case were all before the Court of Appeals. Based on that complete record, and the facts established by that record, the Eighth Circuit correctly found Cooper Tire's interpretation of its ERISA Plan wanting as a matter of law.

There is a fourth and independent record-based reason why Cooper Tire has no real basis to complain about the turn of events in the state court suit: After the separate settlement, the Plan remained subrogated on its claim for medical payments. At the end of the day, Cooper Tire retained all that it was entitled to under the Plan—the right to sue Dr. Pillsbury with Maza's help and in Maza's name to recover its payments under the Plan. *App. 17.* The Court of Appeals therefore properly rejected the Plan's attempt to seize more than it was due through the side agreements.

C. The Eighth Circuit's Decision Followed Settled Precedent and Creates No Inter-Circuit Conflict

The Eighth Circuit's decision dovetails with this Court's cases on considering issues for the first time on appeal. As this Court has repeatedly emphasized, and as petitioner concedes, this Court has "announce[d] no general rule[,]" leaving the matter instead "primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *see also, Arcadia*, 498 U.S. at 77; *Kamen*, 500 U.S. at 90-91 and note 5; *Independent Insurance Agents*, 113 S.Ct. at 2178.

In this case, the Court of Appeals exercised its discretion appropriately, deciding the appeal based on Cooper Tire's interpretation of its ERISA Plan. *App. 12-13.* "Antecedent to . . . and ultimately dispositive of . . . " the parties' dispute over estoppel, the Eighth Circuit properly raised and decided the *Bruch* issue, though the parties failed to do so.

Petitioner argues a conflict between *Singleton* and the Eighth Circuit's decision. Cooper Tire is crying wolf. The rule of *Arcadia*, allowing review of antecedent and dispositive issues, is of a piece with the *Singleton* decision. The Court of Appeals' implicit reliance on the *Arcadia* line of cases brings its decision squarely within the discretionary principles of *Singleton.* As Justice Scalia has noted, prudence animates this area of the law. "But the refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the

contrary." *Davis v. United States*, 114 S.Ct. 2350, 2358 (1994) (Scalia, J., concurring, citing *Independent Insurance Agents).* This Court, moreover, recently harmonized *Singleton* and the *Arcadia* line of cases in *Kamen.* 500 U.S. at 90-100 and note 5. Faithfulness to *Arcadia* is thus faithfulness to *Singleton.* And petitioner's contrary argument should be rejected.

Petitioner also sees a conflict with the "waived argument" cases from across the circuits. *Pet. 28-29.* No such conflict exists. Every single decision relied upon by petitioners turns on a **party's** attempt to make a new argument on appeal. Those cases recite and apply the sound general rule that (subject to exceptions) new arguments by the parties will not be considered for the first time on appeal. *E.g., Stafford v. Ford Motor Co.*, 790 F.2d 702, 706 (8th Cir. 1986). That is not what happened here. The Court of Appeals—not Dr. Pillsbury, St. Paul, or Mr. Maza—approached this ERISA dispute from a fresh perspective. Under *Arcadia*, the Eighth Circuit's approach was correct. Waiver principles in general, and waiver cases from the several circuits, are not affected by an appellate court's resolution of antecedent and dispositive legal issues not raised or briefed by the parties. *Kamen*, 500 U.S. at 99 and note 5. There is no conflict here.[1]

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[1] For example, petitioner's extensive reliance on *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983) (Scalia, J.), is misplaced. *Pet. 25-26.* In *Carducci*, the Court of Appeals rightly refused to consider a Due-Process-Clause issue that the parties raised only in passing. "Because [the issue] was not adequately briefed or argued on appeal," the Court declined the parties' invitation to reach the constitutional issue. *Carducci*, 714 F.2d at 172, 177. The rule of *Carducci*—that half-heart-

The Eighth Circuit's decision in this case accords with other Courts of Appeals' application of the *Arcadia* line of precedents. *E.g., Williams-Guice v. Board of Education of the City of Chicago*, 45 F.3d 161, 164 (7th Cir. 1995); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 738-740 (D.C. Cir. 1995). Judge Frank Easterbrook of the Seventh Circuit recently summarized the prudential factors at work in *Arcadia*-type cases. His summary also highlights the correctness of the Eighth Circuit's decision below. "[L]itigants' failure to address the legal question from the right perspective does not render us powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties' circumstances." *Williams-Guice*, 45 F.3d at 164.

The Eighth Circuit decided, in its sound discretion, that the parties had not addressed the enforceability of Cooper Tire's subrogation rights in this case "from the proper perspective. . . . " *Williams-Guice*, 45 F.3d at 164. Rather than consider Dr. Pillsbury's and St. Paul's estoppel arguments against enforcement—arguments which assumed that the receipt and subrogation agreements were not an abusive interpretation of Cooper Tire's Plan—the Court below "work[ed] out the problem prop-

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ed briefing and argument can waive an issue on appeal—is completely consistent with the *Arcadia* line of cases. The *Carducci* Court acknowledged as much. "Of course not all legal arguments bearing upon the issue in question will always be identified by counsel, and we are not precluded from supplementing the contentions of counsel through our own deliberations and research." *Carducci*, 714 F.2d at 177.

erly." *Ibid.* The Court of Appeals addressed the antecedent and ultimately dispositive legal issue: the reasonableness of Cooper Tire's interpretation of its ERISA Plan subrogation rights. The Eighth Circuit's course was prudent, correct, and consistent with governing precedent. *Arcadia*, 498 U.S. at 77; *Kamen*, 500 U.S. at 98; *Independent Insurance Agents*, 113 S.Ct. at 2178-79.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dr. Pillsbury and St. Paul

SUPPLEMENTAL APPENDICES

In the United States District Court
for the Western District of Arkansas
Texarkana Division

Cooper Tire & Rubber Company, Plaintiff
v.
St. Paul Fire & Marine Insurance Companies,
Robert Maza and Richard C. Pillsbury, M.D.,
Defendant

No. 91-4061

Complaint

To the Honorable Judge of Said Court:

Comes now, Cooper Tire & Rubber Company, complaining of St. Paul Fire & Marine Insurance Companies, Robert Maza and Richard C. Pillsbury, M.D., and for cause of action would respectfully show unto the Court as follows, to-wit:

I.

Cooper Tire and Rubber Company is a citizen of the State of Ohio, where it maintains its principal place of business. Said company is not incorporated, nor does it maintain its principal place of business in Arkansas, although its principal place of business for said state is in Texarkana, Miller County, Arkansas. St. Paul Fire & Marine Insurance Companies are citizens of neither the

State of Arkansas or the State of Ohio. The said insurance company is, however, doing business in the State of Arkansas and may be served with summons on the Insurance Commissioner, Lee Douglas, 400 University Tower Building, Little Rock, Arkansas 72204. Richard Maza is a citizen of the State of Arkansas, who may be served with summons at Route 5, Box 181-B, El Dorado, Union County, Arkansas 71730. Richard C. Pillsbury, M.D. is a citizen of the State of Arkansas who may be summonsed at 613 Thompson, El Dorado, Union County, Arkansas 71730.

II.

Jurisdiction is founded on diversity of citizenship and the amount in controversy which exceeds the sum of Fifty Thousand and No/100 Dollars ($50,000.00), exclusive of interest and costs. Additionally, jurisdiction is provided under 29 U.S.C. Section 1001-1461 (collectively, "ERISA"). Consequently, this Court has original jurisdiction under 28 U.S.C. Section 1331 and 29 U.S.C. §1132. Further, venue is appropriate in this division and district pursuant to 28 U.S.C. Section 1391(a) and (c).

III.

Plaintiff brings this cause in its capacity as a provider of medical benefits under an employee welfare benefit plan as that term is defined in 29 U.S.C. Section 1002. The defendant, Robert Maza, is an individual and employee of Cooper Tire & Rubber Company. Having said status, Robert Maza applied for and received medical benefits as a result of the illness of his deceased wife, Sandra Maza. Said illness was sustained by Sandra Maza on or about June 23, 1988, and continuing until she ex-

pired on December 4, 1988.

IV.

Plaintiff will show that Robert Maza was a salaried employee of Cooper Tire & Rubber Company and subject to the benefits and provisions of the Cooper Tire & Rubber Company Salaried Employees Health Care Plan. Under said Plan, Cooper Tire & Rubber Company paid, on behalf of Robert Maza and Sandra Maza, medical expenses in the sum of Two Hundred Ninety-Eight Thousand One Hundred Eighteen and 07/100 Dollars ($298,118.07). That Plan, in its pertinent provisions, provided as follows:

> "(e.) **Subrogation**
>
> In the event an Employee or dependent of an Employee, including the surviving spouse or a surviving dependent of a deceased employee, is legally entitled to recover, including recovery under uninsured motorist coverage, all or a portion of the cost of a service or prescription drug covered by this Plan from a third party, the Company will upon making payment under this Plan succeed to any rights of recovery the Employee or dependent may have or acquire (with respect to such service or prescription drug) against any person or organization except insurers of individual hospital, surgical, or medical policies issued to the Employee or dependent.
>
> Employees (including dependents, surviving spouses or surviving dependents of deceased Employees) by acceptance of such

benefit payments agree to furnish such information and assistance, and execute such assignment and other instruments as the Company may reasonably request to facilitate enforcement of the successor rights of the Company. Employees and their dependents shall take no action prejudicing such rights of the Company."

A copy of said Plan is attached hereto as Exhibit "A," and incorporated herein the same as if set forth at length. As required by said Plan, Robert Maza executed receipt and subrogation agreements which contained the following provision:

> "In consideration of any to the extent of said payment the undersigned hereby subrogates said Cooper Tire & Rubber Company to all of the rights, claims and interest which the undersigned may have against any person or corporation liable for the loss mentioned above, and authorizes the said Cooper Tire & Rubber Company to sue, compromise or settle in the undersigned's name or otherwise all such claims and to execute and sign releases and acquittances and endorse checks or drafts given in settlement of such claims in the name of the undersigned, with the same force and effect as if the undersigned executed or endorsed them.
>
> Warranted, no settlement has been made by the undersigned with any person or corporation against whom a claim may lie, and no release has been given to anyone responsible for the loss, and **that no such**

settlement will be made nor release given by the undersigned without the written consent of the said Cooper Tire & Rubber Company and the undersigned covenants and agrees to cooperate fully (and to exert his best efforts to cause any affected spouse or dependents to cooperate fully) with said Cooper Tire & Rubber Company in the prosecution of such claims, and to procure and furnish all papers and documents necessary in such proceedings and to attend court and testify (and to exert his best efforts to cause an affected spouse or dependent to attend court and testify) if Cooper Tire & Rubber Company deems such to be necessary but it is understood the undersigned is to be saved harmless from costs in such proceedings."

V.

Subsequent to the death of his wife, Robert Maza initiated litigation in the Circuit Court of Union County, Arkansas, on August 30, 1989. In Cause No. CIV-89-486, styled *Robert Maza, Individually and as Administrator of the Estate of Sandra Maza, Deceased v. Richard C. Pillsbury, M.D.* On February 2, 1990, Cooper Tire & Rubber Company filed in said proceeding a Motion to Intervene, which Motion was granted by the Court on February 7, 1990. Thus, not only Robert Maza, but also Richard C. Pillsbury, M.D., and St. Paul Fire and Marine Insurance Companies, had notice of the subrogation rights of Cooper Tire & Rubber Company. Despite said knowledge, on or about October 15, 1990, Robert Maza, Richard C. Pillsbury, M.D., and St. Paul Fire & Marine Insurance Companies entered into a settlement whereby certain

funds were paid over to Robert Maza by St. Paul Fire & Marine Insurance Companies. Cooper Tire & Rubber Company would show that it was and is entitled to any sums paid by or on behalf of Richard C. Pillsbury, M.D., and St. Paul Fire & Marine Insurance Companies to Robert Maza by virtue of the provisions of the subrogation agreements set forth hereinabove. Cooper Tire & Rubber Company will show that Defendants were fully aware of the subrogation rights of Cooper Tire & Rubber Company and despite said awareness, St. Paul Fire & Marine Insurance Companies and Richard C. Pillsbury, M.D., paid over to Robert Maza sums as damages, to which Cooper Tire & Rubber Company was entitled to succeed under the privileges of the subrogation provision.

VI.

Cooper Tire & Rubber Company will show that it is entitled to recover of Robert Maza all sums received by him from St. Paul Fire & Marine Insurance Companies and/or Richard C. Pillsbury, M.D., and the failure of said Robert Maza to pay over said funds to Cooper Tire & Rubber Company constitutes breach of the contractual provisions set forth hereinabove. Plaintiff would further show that St. Paul Fire & Marine Insurance Companies and/or Richard C. Pillsbury, M.D., intentionally interfered with the existing contractual relations between Cooper Tire & Rubber Company and Robert Maza. Additionally, all said Defendants, having knowledge of the subrogation right of Cooper Tire & Rubber Company, are, by virtue of said contractual agreement and provisions of 29 U.S.C. Section 1001, et seq., required to pay over to Cooper Tire & Rubber Company all sums previously received by Robert Maza.

VII.

Plaintiff would further show it is entitled to recover its attorney's fees from Defendant, Robert Maza, and is entitled to recover punitive damages from Defendants, St. Paul Fire & Marine Insurance Companies and Richard C. Pillsbury, M.D.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants be summoned to appear and answer herein and that upon final trial hereof Cooper Tire & Rubber Company recover of and from defendants, both jointly and severally, the sum of Two Hundred Ninety-Eight Thousand One Hundred Eighteen and 07/100 Dollars ($298,118.07), its reasonable attorney's fees, punitive damages, pre-judgment interest, post-judgment interests, costs, and all other proper relief.

Respectfully submitted,

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(903) 792-3117
Telecopier: (903) 793-1902
Attorneys for Plaintiff

Cooper Tires
Organization Correspondence

To: R. A. Maza

From: Benefits Administration

Subject: "Duplication of Benefits" and "Subrogation"

Date: 5-15-80

In our current "Salaried Employees Health Care Plan" dated January, 1980, there are two sections which are often misunderstood. These two sections are "Duplication of Benefits" and "Subrogation."

The "Duplication of Benefits" section reads as follows:

> There will be no duplication of benefits under any group insurance plan held by reason of full-time employment. When coverage **under another company group hospital**, surgical, medical, or prescription drug benefit program **is available and the employer contributes to the premium payment for the spouse or other dependent including the surviving spouse or surviving dependents of a deceased employee or an employee**, the payment allowable for any service covered hereunder will be limited to an amount equal to the portion of the charge for such service not covered by such other program and the total of said amounts shall not be greater than the maximum that

would have been paid for that service had there been no other coverage. Thus, the Cooper Health Care Plan would be the second carrier.

In those cases where the employee and the spouse are both employed full time and such company group hospital, surgical, medical, or prescription drug benefit program is available to the spouse, all eligible dependent children will be insured as dependents of the male.

In those cases where the employee and spouse are employed, the male employee and his dependent children shall be covered by the primary insurance. The female employee shall be covered as a single individual with no dependents. In the event, however, that any female employee's husband is not employed by the company (Cooper) and is not in fact covered by a group hospital, surgical, medical or prescription drug benefit program, all eligible dependent children will be insured as dependents of such female employee, unless (1) husband or former husband of such female employee is under court order to provide such coverage and (2) such female employee fails to provide the company with an affidavit (a) that her husband or former husband cannot be located after reasonable efforts or is unable and/or unwilling to comply with such court order and (b) that she will continue to exercise reasonable efforts to compel her husband to comply with such court order and will reimburse the company for any payments made by the

company as a result of such affidavit to the extent that any collections are subsequently made from her husband or former husband on account of such expenses paid by the company. This assignment of dependents will not deprive eligible dependent children of medical benefits by reason of death of the male or by reason of termination of insurance.

You should read carefully and understand the above paragraph if your spouse works and his/her employer pays any part of the premium for health coverage. If your spouse's employer pays any part of the premium, Cooper's Health Plan will not pay any charges that your spouse's insurance would have paid, whether or not your spouse enrolled for his/her employer's health coverage.

The "Subrogation" section reads as follows:

In the event an employee or a dependent of an employee, including the surviving spouse or a surviving dependent of a deceased employee, is legally entitled to recover, including recovery under uninsured motorist coverage, all or a portion of the cost of a service or prescription drug covered by the Plan from a third party, the company will upon making payment under this Plan succeed to any rights of recovery the employee or dependent may have or acquire (with respect to such service or prescription drug) against any person or organization except insurors of individual hospital, surgical, or medical policies issued to the employee or dependent

> Employees (including dependents, surviving spouses or surviving dependents of deceased employees) by acceptance of such benefit payments agree to furnish such information and assistance and execute assignments and other instruments as the company may reasonably request to facilitate enforcement of the successor rights of the company. Employees and their dependents shall take no action prejudicing such rights of the company.

The Subrogation Section permits Cooper to be reimbursed from any liable third party for medical expenses incurred, as the result of an accident, by an employee or eligible spouse or dependent. A liable third party may be the party at fault, his/her insurance company or, when appropriate, your uninsured motorist coverage. Under this paragraph you will be asked to sign an agreement that allows Cooper to collect from the liable third party, then Cooper's medical Plan will pay all medical costs that are covered by the Plan.

You received two copies of this letter. If you understand these two sections of our health care Plan, please sign one copy of this letter in the designated place and return to J. H. Wilkins, Personnel Department. If you do not understand these sections, or have any questions about them, please contact your Personnel Office.

I have read and understand the above letter.

R. MAZA

Date: 6-10-80